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# In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

*v.*

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR THE APPELLANTS

**ROBERT H. BORK,**
*Solicitor General,*
**WALLACE H. JOHNSON,**
*Assistant Attorney General,*
**FRANK H. EASTERBROOK,**
*Assistant to the Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

**FRITZ R. KAHN,**
*General Counsel,*
**BETTY JO CHRISTIAN,**
*Associate General Counsel,*
**CHARLES H. WHITE, JR.,**
*Attorney,*
*Interstate Commerce Commission,*
*Washington, D.C. 20423.*

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## BRIEF FOR THE APPELLANTS

### OPINIONS BELOW

The opinion of the district court (J.S. App. A, pp. 1a–56a) is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order dated September 27, 1972, and served October 4, 1972, in Ex Parte 281, *Increased Freight Rates and Charges, 1972* (J.S. App. D) is reported at 341 I.C.C. 290. The Commission's final environmental impact statement and consideration of environmental matters is reported

at 346 I.C.C. 88.[1] The Commission's order of May 2, 1973 (J.S. App. E) is not reported.

### JURISDICTION

The judgment of the district court (J.S. App. B) was entered on February 19, 1974. Notices of appeal (J.S. App. C) were filed on April 19, 1974. On June 13, 1974, the Chief Justice extended the time for docketing the appeal to and including July 2, 1974. This Court noted probable jurisdiction on October 15, 1974, and consolidated the case with No. 73-1966. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. See *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372; *Electronic Industries Association* v. *United States*, 401 U.S. 967, affirming 310 F. Supp. 1286.

### QUESTIONS PRESENTED

1. Whether the court below, in prohibiting the Interstate Commerce Commission from approving a general railroad rate increase without first conducting a thorough analysis of the underlying rate structure in an environmental impact statement, improperly interfered with the Commission's discretion to determine the appropriate type of proceeding in which to address complex questions relating to rate-making.

2. Whether NEPA requires that a new hearing be conducted to consider an environmental impact state-

[1] Ten copies each of the Commission's final report and order in Ex Parte 281, and of its final environmental statement (App. 9–199) previously have been lodged with the Court. The Commission's final report in Ex Parte 281 contained detailed discussions of commodity groups not involved in this proceeding, and other non-germane discussions, which were omitted from J.S. App. D. See J.S. 1.



ment, where the sole agency decision makers conducted a hearing and considered environmental issues before reaching their decision.

### STATUTES AND REGULATIONS INVOLVED

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, and the Commission's special environmental rules, 49 C.F.R. 1100.250, are set out in the appendix, *infra*, pp. 55–62.

### STATEMENT

This is an appeal from a final judgment of a three-judge district court (J.S. App. B) directing the Interstate Commerce Commission to conduct additional proceedings in a general revenue proceeding. This is, we hope, the final chapter in a long and complex litigation that has twice been before this Court,[2] involving the application of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* (NEPA), to the special requirements of general revenue proceedings of the Interstate Commerce Commission conducted pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7).

#### A. BACKGROUND

Under the Interstate Commerce Act rates are set by the railroads, subject to disapproval by the Commission. A carrier may file a proposed rate increase and after 30 days (or such shorter period as the Commission may authorize) the new rate becomes effective

[2] *United States* v. *S.C.R.A.P.*, 412 U.S. 669; *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

as a carrier-made rate, 49 U.S.C. 6(3). However, the Commission may suspend the proposed tariff within that 30-day period for a maximum of seven months, while it conducts an investigation into the lawfulness of the rate, 49 U.S.C. 15(7). At the end of the suspension period the carrier may put the new tariff into effect unless the Commission, prior to that time, has completed its investigation and ruled that the proposed rate is unlawful. See *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658.

These procedures govern both the carriers' collective requests for general revenue increases, and individual rate filings. In general revenue proceedings, such as Ex Parte 281, involved here, the carriers as a group seek to increase the average rates charged. The average increase is an aggregate of the increases for particular commodities or specific groups of commodities; however, no specific authority is sought for any one of the particular increases. If the carriers demonstrate that the general revenue increase is needed to enable them to provide the Nation with adequate transportation and the Commission determines that it is consistent with the public interest, the Commission will authorize a permissive general revenue increase.[3] In such proceedings the Commission does not determine the reasonableness of individual

[3] See, *e.g.*, *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 D. D.C.), affirmed by an equally divided court *sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 814, n. 10.



rates, nor does it consider the relationship of rates for different classes of commodities. Its authorization of the general revenue incease simply gives carrier management more discretion within which to set their individual competitive rates.[4]

Faced with increasing costs during a time of inflation, and with deteriorating capital and cash flow positions (J.S. App. D, pp. 4d–20d), in December 1971, the Nation's railroads collectively petitioned the Commission for authorization to file a temporary 2.5 percent surcharge on nearly all freight rates. This emergency interim measure was intended to redress the railroads' financial condition pending their filing of proposed permanent selective revenue increases.

Because it believed that the railroads had a critical need for additional revenues the Commission permitted the surcharge to take effect on February 5, 1972, on condition that it expire before June 5. The railroads then filed proposed selective permanent increases averaging 4.1 percent. On April 24, 1972, the Commission began an investigation into the lawfulness of the permanent rate increases and suspended the increases for seven months, the maximum period allowed by Section 15(7). Because the suspended permanent increases were intended to supplant the emer-

[4] If a railroad does decide to amend its tariff, the Commission's general revenue order means that a shipper challenging any individual rate increase that is within the percentage increase authorized in the general revenue proceeding must establish that the new rate is unreasonable or otherwise unlawful. The general revenue order does no more than shift the burden of proof from the carrier to the shipper.

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gency temporary surcharge, the Commission authorized the railroads to continue to collect the 2.5 percent surcharge until November 30, 1972—the end of the suspension period on the selective increases.

### B. COMMISSION PROCEEDINGS AND ENVIRONMENTAL CONSIDERATIONS

When the Commission, on December 21, 1971, advised the railroads that it would not suspend an interim surcharge, it also requested them to provide the Commission with information—in the form of an environmental impact statement—concerning the environmental effects of any proposed change in the rate structure. The railroads complied with the Commission's directive, and their statement was filed on January 3, 1972.[5]

This procedure was in compliance with the environmental rules then under consideration by the Commission as a means of implementing the Commission's responsibility, under Section 102(2)(B) of NEPA, to "identify and develop methods and procedures" for incorporating environmental considerations into all Commission decisions. Formal regulations under Section 102(2)(B) were published on January 14, 1972, and became effective March 28, 1972. See 340 I.C.C. 431; 49 C.F.R. 1100.250 (App. *infra* pp. 58–62). These regulations provide that the Commission itself will make a detailed environmental impact statement whenever "the regulatory action taken by the Commission * * * will have * * * a significant environmental

[5] The Commission summarized this statement at J. S. App. D, pp. 93d–94d.



impact." 49 C.F.R. 1100.250(b)(2). The regulations further require that with "all initial papers filed with this Commission by a party, there shall be" submitted an environmental impact statement, meeting the criteria of Section 102(2)(C) of NEPA, if it appears that the party's proposal will have a significant effect on the environment. 49 C.F.R. 1100.250(d). All environmental statements, whether drafted by the Commission or by a party, are to be served on other interested parties and governmental agencies, and their comments are invited. These rules thus seek to ensure that, in every proceeding before the Commission, all parties will focus from the outset on the possibility of environmental considerations, and that they will be in issue throughout the established agency process.

In order to introduce additional environmental considerations into the railroads' request in this case for the permanent selective increases, the Commission's staff prepared a draft environmental impact statement, dated March 1, 1972, and served March 6, 1972. The statement concluded that no substantial environmental effects would be produced if the proposed permanent selective increases went into effect (J.S. App. D, pp. 89d–92d). Comments were invited on this draft impact statement, and were received from numerous protestants, interested persons, and government agencies (see J.S. App. D, pp. 98d–107d).

On June 15 and 16, 1972, oral argument was held before the Commission on the permanent selective increases. All interested persons were invited to address the issues, including the environmental issues, involved in Ex Parte 281. The Commission's decision,

dated September 27, 1972, and served October 4, 1972 (J.S. App. D), deals in some detail with the environmental implications of the rate increase (J.S. App. D, pp. 20d–35d, 49d–85d). The Commission considered both its draft environmental impact statement of March 6 and the comments made in response; after this "extensive consideration," *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 683, n. 11, it concluded once more that no serious environmental effects would result from a marginal increase in most rail rates, in which the ratio of rates for recyclables to rates for virgin materials would be unchanged. Even so, out of an abundance of caution, the Commission ordered that rate increases on nonferrous scrap not exceed three percent (J.S. App. D, p. 60d). Moreover, the Commission withheld approval of all increases on recyclables by requiring the railroads to file their tariffs on recyclables on at least 35 days' notice (J.S. App. D, p. 87d). Two Commissioners dissented and would have disapproved the increases on recyclables (J.S. App. D, pp. 87d–88d).

During those 35 days the Commission continued to study the environmental problems, and received additional comments concerning its decision of October 4. As a result of these comments, when the railroads filed their proposed tariffs embodying the specific increases on recyclables the Commission, on November 7, 1972, suspended the tariffs, as applied to recyclables, for the maximum seven-month period allowed by statute and invited additional comments. This effectively reopened Ex Parte 281.



The Commission's staff then compiled an extensive bibliography of books, articles, and other materials that could bear on the results of a rate increase. This bibliography was distributed during December 1972 (see App. 161–182). The Commission itself published a second environmental impact statement dated March 5, 1973, and released March 13, 1973. This statement was more comprehensive than the first statement, but again concluded that permitting the selective increases to become effective would have no significant adverse impact on the environment. After receiving additional comments on this impact statement (see App. 191–198), the Commission concluded that the rate increases should be allowed to become effective.

The Commission's decision, dated May 1, 1973, and released May 2, 1973, extensively considered and responded to the comments submitted in response to the impact statement. The final decision contained a discussion of general environmental considerations (App. 17–58, 157–158), an examination of the nature of the rail rate structure and of the contentions that the rate structure is more favorable to virgin than to recyclable materials (App. 24–55), and a thorough discussion of the potential for diversion of freight from rail to truck transportation (App. 58–65). It considered the environmental questions on a commodity-by-commodity basis (App. 70–137). Because ferrous scrap is the major recycled waste product, the statement also considered the effects of the rate structure on steel-making technology and the steel industry, and of steel-making technology on the demand for ferrous scrap (App. 76–82). The Commission attempted

to draw inferences about the elasticity of demand for scrap and the consequent effect of a change in rail rates; its data showed no significant correlation between the trend of rail prices and the fluctuations in the employment or price of secondary commodities (App. 67). Finally, the Commission discussed alternatives to rate increases on recyclable commodities, and concluded that scrap users and shippers—rather than transportation companies through nonremunerative rates—should bear the cost of shipping scrap (App. 140–157).

After weighing all of these considerations and alternatives, including those discussed in its second environmental impact statement, the comments thereto and "all available literature" compiled in the bibliography (App. 14), the Commission once more concluded that an across-the-board increase in the rates for transportation of both recyclable and virgin materials would not have a significant adverse effect on the environment and that, to the extent there was any effect, it was justified by the railroads' pressing need for funds and the principle that shippers should pay just and reasonable rates for each class of commodities shipped (App. 158). The Commission therefore terminated the proceeding, allowing the rates to go into effect on June 7, 1973, approximately one and one-half years after the railroads first had requested the increase.

### C. PREVIOUS JUDICIAL PROCEEDINGS

At numerous points in the Commission's proceedings environmental groups, and other interested parties, have sought judicial review of the Commission's



actions. Immediately after the Commission first suspended the permanent selective increases and extended the duration of the interim surcharge, a group of law students—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)—filed suit alleging that the Commission's environmental considerations in deciding not to suspend the surcharge were inadequate. Other interested environmentalists intervened in this suit. The three-judge district court enjoined the railroads from collecting the surcharge, and ordered the Commission to vacate its order permitting the surcharge to become effective without suspension. 346 F. Supp. 189 (D. D.C.). This Court reversed, holding that under Section 15(7) of the Interstate Commerce Act the Commission has exclusive power to suspend rates pending its decision on their lawfulness, and that NEPA had not conferred on the district court any authority over such suspension decisions. *United States* v. *S.C.R.A.P.*, 412 U.S. 669.

While that case was pending in this Court, S.C.R.A.P. and the other groups sought to enjoin the permanent increases that the Commission had authorized on October 4, 1972. On January 9, 1973, the district court denied the requested injunction in light of the Commission's November 7 order suspending the tariffs on recyclables and reopening Ex Parte 281. 353 F. Supp. 317 (D. D.C.). After the Commission on May 2, 1973, again approved the increases, the plaintiffs on May 30 renewed their request for an injunction. On June 7, 1973, in an unpublished order, the district court preliminarily enjoined the Commission from permitting, and the railroads from collecting, the increases.

The next day the Commission and the railroads filed applications in this Court seeking a stay of the district court's order. Mr. Chief Justice Burger that day granted the stay; on June 25, 1973, this Court denied an application to vacate the stay. 413 U.S. 917. The district court's injunction subsequently was vacated, 414 U.S. 1035, and the case was remanded for further consideration in light of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800.

### D. THE PROCEEDINGS NOW ON APPEAL

While the government's appeal from the June 7 injunction was pending in this Court, the appellees filed motions for summary judgment in the district court. They sought (1) a declaration that the Commission's approval of the selective rate increases was void because the environmental impact statement was inadequate; (2) an order directing the Commission to prepare a new impact statement and reconsider the rate increases; and (3) a permanent injunction forbidding the railroads from collecting the increased rates on recyclables authorized by Ex Parte 281. The government and the railroads filed cross-motions for summary judgment; the railroads also filed affidavits demonstrating the severe financial effects on them of any injunction prohibiting their collection of the increased rates.

On February 19, 1974, the district court set aside the Commission's approval of the increases on recyclables, and ordered the Commission to reopen Ex Parte 281, issue another impact statement, and reconsider in full all of the issues in the proceeding (371 F. Supp. 1291; J.S. App. A).[6]



The court held the Commission's environmenal impact statement inadequate. The most important defect, in the court's view, was that the statement confined its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (J.S. App. A, p. 34a). The court also believed that the impact statement inadequately analyzed the elasticities of demand of many of the scrap categories, and therefore could not have shown with certainty the effect of a particular rate increase on the use of the transported goods (J.S. App. A, pp. 31a–32a).[7]

The district court also ruled that the Commission had failed to give sufficient consideration to the impact statement it drafted because, after the impact statement of March 5, 1973, was circulated, the Commission did not hold new oral hearings but instead allowed only written commentary; the court held that the Commission had thus failed to follow the NEPA requirement that the impact statement accompany the pro-

[6] However, the district court declined to enjoin the railroads from collecting the increased rates. J.S. App. A, pp. 6a, 44a–50a. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800.

[7] The court referred also to what it regarded as subsidiary "defects" of the statement, such as the "defensive and advocatory language and style in which it is written," J.S. App. A, p. 29a; the fact that it was prepared by the Commission's staff, J.S. App. A, p. 23a (see n. 11, *infra*); and the alleged failure of the final report to "confront or even acknowledge the critical comments" of other interested parties, J.S. App. A, p. 23a. See p. 35, n. 16, *infra.*

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posed rate increase through all existing agency review procedures (J.S. App. A, pp. 42a–43a).

District Judge Flannery dissented (J.S. App. A, pp. 51a–56a) on the ground that the district court did not have jurisdiction to entertain a challenge to a general revenue proceeding of the Commission; Judge Flannery would have required S.C.R.A.P. and others to begin proceedings in the Commission alleging that a particular rate was not just and reasonable. On the environmental issues, he concluded that the Commission's procedures had complied with NEPA because the Commission "has clearly taken the 'hard look' at possible environmental consequences mandated by Congress" (J.S. App. A, p. 55a).

## SUMMARY OF ARGUMENT

The basic purpose of NEPA is to ensure that federal decision makers give full consideration to the environmental effects of their decision; NEPA adds a new factor to the other factors particular agencies ordinarily must weigh. But neither NEPA as a whole, nor the requirement in Section 102(2)(C) that the agency prepare an impact statement, elevates environmental factors to a dominant position. It is sufficient for the agency to take a hard look at the potential environmental effects (in accordance with NEPA's procedural requirements) and to exercise its statutory responsibilities in light of that hard look.

The practical meaning of the required "hard look" necessarily depends on the particular function the agency is performing and the type of decision under consideration. The peculiar limitations of the Com-



mission's role in a general revenue proceeding are thus significant. In such a proceeding the Commission does not propose action but merely passes on the legality of action that emanates from the railroads. Such a proceeding operates under severe statutory time constraints, and the Commission accordingly bases its deliberations essentially on marginal concerns; it takes as given the previous rate structure and assesses the legality of the proposed changes. And the Commission's decision, of course, must be based on accepted ratemaking criteria. In light of these considerations, we submit that the requirements of NEPA were satisfied here.

## I.

The Commission here gave "extensive consideration to environmental aspects of the rate increases," *S.C.R.A.P., supra,* 412 U.S. at 683, n. 11. Environmental considerations pervaded the general revenue proceeding. The railroads were required to submit their own impact statement. Comments were invited on those materials. The Commission published an impact statement and invited comments in March 1972. All interested persons who wished to do so submitted written comments and appeared at oral hearings held in June 1972, and the Commission's decision in October 1972 discussed environmental concerns that had been suggested. The Commission then published its bibliography and solicited comments. It issued a massive impact statement analyzing in detail not only the general environmental arguments that had been advanced since early 1972, but also the potential impact

by commodity group. Comments again were invited and considered. Finally, the Commission approved most of the increases on scrap, but limited the increases on non-ferrous scrap to three percent. In doing so, the Commission determined that there would be no significant adverse effect on the environment, and that the possible environmental impact in certain categories of scrap was justified by countervailing considerations. We submit that this procedure fulfilled the duties imposed by NEPA on the Commission.

The district court, however, found the procedure inadequate. To the extent the court did so because of alleged defects in the impact statement itself, it was both overemphasizing the role of the impact statement in the process of giving consideration to environmental effects, and improperly substituting its judgment for that of the Commission concerning the magnitude of the potential environmental effects identified by the statement and the protestants.

## II.

The decision below also improperly interfered with the Commission's authority to govern its proceedings. The Commission traditionally has used the general revenue proceeding only as a temporary expedient, a method of authorizing an overall rate increase without an examination of particular rates or of the basic rate structure. Particular rates always may be challenged by protestants in separate proceedings. Moreover, although thorough examinations of the entire rate structure are infrequent, one is now under way in Ex Parte 270; it was commenced four years ago and



will consume several years more before it is completed. The district court's directive to the Commission to consider in a general revenue proceeding all of the environmental effects of the entire rate structure effectively would prohibit the Commission from holding general revenue proceedings, which must be completed within seven months. This is a substantial interference with the Commission's ability to decide on the most efficient method to conduct its enquiry; it was entirely reasonable for the Commission to decide, as it has, to investigate the entire rate structure in a single, consolidated proceeding, while limiting its consideration of other rate requests largely to their marginal effects on both the rate structure and the environment.

## III.

It also was proper for the Commission to conclude its environmental consideration without holding oral hearings after it had issued the March 1973 impact statement. The Commission's general revenue proceedings are rulemaking under Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, and such proceedings do not require oral hearings. The Commission sometimes conducts such hearings at some point in a general revenue proceeding, but it does not entertain oral hearings in all or even most such proceedings, let alone separate oral hearings on each issue. There was, accordingly, no requirement under NEPA that the Commission reopen the entire general revenue proceeding and afford new hearings.

## ARGUMENT

### I. THE COMMISSION'S CONSIDERATION OF ENVIRONMENTAL FACTORS WAS ADEQUATE

#### A. NEPA REQUIRES THE COMMISSION TO TAKE A HARD LOOK AT ENVIRONMENTAL FACTORS

Like its predecessor *United States* v. *S.C.R.A.P.*, 412 U.S. 669, this case involves problems of accommodation between the National Environmental Policy Act of 1969 (NEPA) and the Commission's disposition of a general revenue proceeding under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7).

NEPA was enacted to ensure that federal agencies would consider the environmental effects of their decisions. See, generally, Hearing before the Senate Committee on Interior and Insular Affairs, on S. 1075, S. 237 and S. 1752 (National Environmental Policy), 91st Cong., 1st Sess. 24–34. Congress chose several tools to bring about this consideration: it required each agency to utilize the natural and social sciences and the environmental arts when the agency's decision might have an impact on the environment (Section 102(2)(A)); to identify and develop methods and procedures to ensure that environmental considerations enter into all decisions (Section 102(2)(B)); and to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment" a detailed statement concerning environmental effects and alternatives (Section 102(2)(C)). This last requirement—the "environmental impact statement"—essentially requires the agency to set



down in words the environmental effects it has found, and the considerations it deems relevant, in light of the investigations required by Section 102(2)(A), (B), and (D). The statement's preparation, therefore, does not require additional investigations beyond the scope of those specified in the other parts of Section 102. The function of the impact statement is to alert the public and other federal agencies to the environmental issues potentially raised in an agency proceeding, so that they may comment; it also is useful to remind the agency itself of the environmental concerns—it is to "accompany the proposal through the existing agency review processes" (Section 102(2)(C)).

The impact statement is thus no more than the agency's report to the public and to itself concerning its environmental findings. Accordingly, the impact statement requirement does not mean the agency is required to adopt any particular form of environmental review; nor does it alter the laws that control the conduct of the Commission's proceedings or the laws that govern judicial review of the Commission's actions. *S.C.R.A.P., supra,* 412 U.S. at 692–694. As Senator Jackson, the principal sponsor of NEPA, stated on the floor of the Senate, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decision-making" (115 Cong. Rec. 40416). See *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F. 2d 1109, 1114 (C.A.D.C.):

> The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action.

Accord, *Cape Henry Bird Club* v. *Laird*, 359 F. Supp. 404 (W.D. Va.), affirmed, 484 F. 2d 453 (C.A. 4). There is no suggestion in the legislative history of NEPA that Congress intended to require a particular form of compliance with the requirement that environmental considerations be discovered and communicated to the public. It was enough that the discovery and communication take place. Nor is there any suggestion that environmental considerations are to dominate other concerns when the agency is considering them in reaching a final decision.

Accordingly, the federal courts properly have applied a rule of reason when ascertaining whether a federal agency has complied with the requirements of Section 102.[8] "So long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress," they have fulfilled the duty imposed on them by NEPA. *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A.D.C.).

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[8] See, *e.g.*, *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 294–297 (C.A. 8); *Bradford Township* v. *Illinois State Toll Highway Authority*, 463 F.2d 537 (C.A. 7), certiorari denied, 409 U.S. 1047; *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A.D.C.); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656–657 (C.A. 10); *Upper Pecos Association* v. *Stans*, 452 F.2d 1233 (C.A. 10).



Although every federal agency must take a hard look at the environmental consequences of its decisions, the nature of the inquiry that is appropriate and required depends on the nature of the function performed by the agency and the type of decision under consideration. *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079, 1091–1092, 1095, n. 68 (C.A.D.C.). It is thus significant that the Commission here performs a function different from that of many other federal agencies. Railroad rates are set in tariffs filed by each rail company. The role of the Commission is limited. The Commission may investigate a proposed rate, and declare that it is not just and reasonable; it may suspend rates for as long as seven months in order to complete such an investigation. But if the Commission cannot declare that the rate is unlawful, it takes effect. The process is instigated by private parties. The Commission essentially adjudicates the lawfulness of the carrier's proposed rate. To be sure, the Commission is an active adjudicator; Commission staff gathers information independent of that submitted by the parties and protestants. But its role is less active than that of other agencies that propose specific projects, decide whether the project will take place at all and, if so, where it will be built or occur and in what form.

The Commission's role is more limited still in a general revenue proceeding, as it explained in this case (App. 148–149):

> The general rate case or general revenue proceeding is altogether different [from rate adjustment or investigation proceedings]. * * *

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> Our authorization of the requested increases, or some other increases, which we determine to be just and reasonable, in no way is an approval by us of the resultant rates and charges on specific articles and movements. It merely is an indication by us that we are persuaded by the railroads' revenue requirements and that they may increase their rates and charges to the level authorized by us to meet their demonstrated needs for increased revenues. * * * [O]ur authorization in general rate cases or general revenue proceedings *does not connote our sanction of any particular rate or group of rates as increased* by the railroads * * * [emphasis added].

The Commission's approval of a general revenue increase does no more than indicate that the railroads have an overall need for increased revenues.[9] It does not approve any particular tariff setting forth a specific rate for any commodity. After the general rate increase has been approved each railroad must file a tariff setting out each rate increase; these tariffs may be challenged on any appropriate ground and the Commission's action in the general revenue proceedings merely shifts to the protestant the burden of assailing a tariff established within the percentage increases authorized in the general revenue proceeding. The general revenue proceeding is useful to the Commission, the railroads, and the public precisely because it is "general"—it is addressed to an overall need for revenue and leaves other and more specific questions for another proceeding. Only by this division of functions is it possible for rates to be studied in time for the Commission's decision to be useful.

[9] See cases cited in note 3, *supra*.



In these circumstances, we submit, NEPA does not require the Commission to conduct environmental studies or make environmental reports more exhaustive in scope than the fiscal and financial studies and reports that are at the heart of a general revenue proceeding. It is our position that the Commission fulfills its duties under NEPA if it undertakes in good faith to ascertain the potential environmental consequences of its general revenue decisions (Section 102(2)(A)), and makes a reasonable attempt to ascertain the magnitude of those effects (Section 102(2)(B)). If the Commission determines, as a result of these preliminary and "automatic" environmental investigations that the decision confronting it would "significantly affect * * * the quality of the human environment," it must set down the nature of this effect in a "detailed statement" so that it can be discussed both within and without the agency (Section 102(2)(C)). The Commission must listen to comments concerning its preliminary analysis (Section 102(2)(C)), and, if a conflict between environmental values and other concerns of the Commission develops, the Commission must analyze alternatives that might minimize that conflict (Section 102(2)(D)). But having done all of this, the Commission is entitled to reach its own decision concerning the resolution of the conflict, subject only to the ordinary requirement that the Commission's ultimate decision not be arbitrary or capricious in light of the evidence developed. Cf. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Sys-*

*tem, Inc.*, No. 73–1055, decided December 23, 1974, slip op. 4, 10–12; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749, 753. There is no requirement in Section 102 that the environmental examination be exhaustive or unceasing; nor is there any requirement that the environmenal analysis be more extensive than the analysis suitable to the other factors that the Commission must consider in the general revenue proceeding. Indeed, the impact statement specified in Section 102(2)(C) is not required at all unless the preliminary analysis required by Section 102(2)(A) and (B) reveals significant environmental consequences. The agency is not required—to change the well-known metaphor—to conduct a search for the soot speck in the haystack. Cf. *Louisiana* v. *Federal Power Commission*, 503 F.2d 844, 875–877 (C.A. 5).

### B. THE COMMISSION'S ANALYSIS INCLUDED A HARD LOOK AT ENVIRONMENTAL CONSEQUENCES

#### *1. Environmental Considerations Pervaded Ex Parte 281*

Although a general revenue proceeding is by its nature rapid and not an exhaustive investigation, and although the Commission is responsible only for approval of a revenue increase rather than for the specific rates, environmental considerations, addressed to the propriety of specific rate increases on recyclables (scrap), entered Ex Parte 281 at its outset. The Commission on December 21, 1971, required the railroads to file an environmental impact statement. They complied on January 3, 1972. From that point on the parties and protestants were on notice that the Commission actively was considering the environmental consequences of a general rate increase. All were entitled to comment to the Commission on the railroads' submission.[10] See 49 C.F.R. 1100.250(e)(2) and (3).



In order further to facilitate discussion the Commission's staff prepared, and the Commission released, a draft environmental impact statement, which was served on March 6, 1972. The parties were told that the Commission did not believe that there would be significant environmental effects from a general rate increase. Again the concerned parties were at liberty to file comments disagreeing with this evaluation; many did so. The Commission listened to additional comments at the oral hearing on June 15 and 16, 1972. The Commission's decision, served October 4, 1972, fully considered the environmental problems and, with all of the contrary views before it, it again concluded that there would be no significant impact. However, out of an abundance of caution, the Commission limited increases on nonferrous scrap to three percent, which would make such scrap relatively more attractive compared with virgin materials, the transportation costs of which were increased more greatly. The Commission also extended to the maximum the notice

[10] Cf. *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069 (C.A.D.C.), holding that an applicant's impact statement, together with analysis and comment by the agency's staff, may fulfill an agency's NEPA obligations.

the railroads would be required to give before the rates on scrap could become effective, so that it could continue to consider the increases on recyclables.

During this interim additional comments were received. As a result the Commission suspended the tariffs on recyclables for the maximum seven-month period permitted by Section 15(7), effectively reopening Ex Parte 281. The Commission published a comprehensive bibliography of literature bearing on the environmental effects of rate increases, and accepted comments and suggestions of additional literature that should be surveyed. It then published another draft impact statement (App. 200–420), this one much more extensive than the first. This second impact statement, served on March 13, 1973, discussed all of the points and considerations that had been raised since the proceedings began more than a year earlier; it included discussions of "discrimination" against recyclables as a class, the potential for diversion of rail traffic to "more polluting" transportation means such as trucks, and a commodity-by-commodity study of the impact of the rate increases. Environmental comments were again invited—for the sixth time in Ex Parte 281. It was only after this sixth round of environmental publication followed by comment that the Commission finally concluded that an across-the-board rate increase would not significantly affect the environment, and terminated Ex Parte 281.

We submit that it is apparent from this chronology that the Commission was sensitive to the potential effect of rate increases on the environment, and that it took the hard look required by NEPA.



### *2. The Commission's Environmental Impact Statement Was Adequate*

The district court, instead of considering the entire record of the Commission's consideration of environmental factors in Ex Parte 281, focused its critique solely on the draft environmental impact statement of March 13, 1973, as adopted in the May 2, 1973 Commission report. We submit that this was improper. NEPA was intended to produce adequate environmental consideration; the impact statement required by Section 102(2)(C) is not an end in itself but simply one means among many to produce such adequate consideration. Accordingly, where the record discloses adequate consideration of environmental factors, technical defects in an impact statement do not prevent the agency from making a valid final decision. See, *e.g.*, *Life of the Land* v. *Brinegar,* 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961; *Upper Pecos Association* v. *Stans, supra,* 452 F. 2d at 1237; *City of New York* v. *United States,* 344 F. Supp. 929 (E.D. N.Y.) (Friendly, J.).

In any event, the district court's criticisms of the Commission's impact statement are not persuasive.[11] As this Court has noted, the gravamen of the environmentalists' allegations of adverse environmental ef-

[11] There is no substance to the district court's denigration of the Commission's final impact statement as a "staff-prepared impact statement" (J.S. App. A, p. 23a). Although the Commissioners of course employed staff assistance to perform the physical task of research and writing (cf. *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777 (S.D. Tex), affirmed *sub nom. Herrin Transportation Co.* v. *United States*, 366 U.S. 419), the final statement was adopted by the full Commission as its own and is an official Commission document.

fects resulting from a general rate increase is that "a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods * * * ." *S.C.R.A.P., supra,* 412 U.S. at 688. The critical issue, therefore, is whether the movement of scrap is in fact retarded by relatively small increases in the freight rates for all classes of commodities. The Commission, after full analysis of all evidence currently availabe, concluded that the movement of scrap is insensitive to minor rate changes.

Because the principal controversy centered upon iron and steel scrap, the Commission gave primary attention to those commodities. The Commission found that ferrous scrap prices fluctuate in a pattern not correlated to the underlying transportation rates (J.S. App. D, p. 65d). For example, between 1968 and 1973 the Commission authorized a 6% general increase effective in November 1969; a 6% increase effective in November 1970; and an 11% increase effective in April 1971 (Ex Parte 262, 265, and 267). During that period, according to *Metal Statistics 1973,* published by American Metal Markets, N.Y., the price of scrap fluctuated as follows:

*No. 1 heavy melting scrap steel (composite average of prices at Pittsburgh, Philadelphia and Chicago)*

[In dollars per gross ton]

| | 1968 | 1969 | 1970 | 1971 | 1972 | As of Sept. 26, 1973 * |
|---|---|---|---|---|---|---|
| Annual average..... | 35.94 | 30.56 | 44.95 | 34.46 | 36.63 | 58.83 |
| High..... | 31.62 | 35.36 | 46.04 | 40.81 | 41.97 | ..... |
| Low..... | 23.11 | 26.33 | 35.95 | 31.08 | 33.09 | ..... |

* Quotation Published in Daily American Metal Market.



Thus, despite freight rate increases throughout the period the price of scrap fluctuated, with the high price of 1970 exceeded only by the 1973 price. Apparently market factors other than freight rates are primarily responsible for scrap costs.[12] Moreover, freight rate increases are a relatively small portion of scrap costs (J.S. App. D, p. 63d) and are considerably smaller than the year to year or even month to month variations in price, which range as high as $8.64 per ton over short terms during which freight rates have remained constant (J.S. App. D, pp. 66d–67d).

In fact, as the scrap industry itself has admitted in other contexts, rail transportation rates are not critical. The demand schedule for scrap, not freight rates, is the primary determinant. Dr. Herschel Cutler, Executive Director of the Institute of Scrap Iron and Steel, stated in recent testimony to Congress that the problem of recycling ferrous scrap will not be solved until the steel industry starts buying more scrap (App. 266). With respect to iron and steel scrap, the Commission considered in detail the manufacturing process, with particular attention to the technology the scrap and the ways in which it can be used in competition with virgin ferrous materials (App. 70–82). As the Commission found in its impact statement, technological limitations unrelated to transportation inhibit greater use of scrap.

[12] In the scrap industry the seller pays the freight charges (J.S. App. D, p. 64d), so that a freight rate increase, given ordinary and stable demand schedules, would increase the delivered price of scrap by slightly less than the increase in rates.

Similarly, other secondary materials are affected minimally by increases in rail rates. In the paper industry, for example, processing plants traditionally are located near sources of pulpwood rather than near sources of recyclable paper; this imposes greater transportation costs on the latter because of greater distances (App. 87). Moreover, virgin products have been available at low cost, thus making it very hard for the recyclable commodities to compete (*ibid.*). All this properly led to the conclusion that the maximum 3% increase on wastepaper would not have a significant adverse effect on the environment (App. 97).

The Commission also analyzed the assertion that scrap contributes a disproportionate share of rail revenues over costs, and concluded that this contention is inaccurate. As the Commission explained in *Institute of Scrap Iron and Steel, Inc. v. Akron, C. & Y. R.*, 316 I.C.C. 55, 62–63, sustained *sub nom. Frank Adams & Co. v. United States* (unreported, Civ. No. 5093, S.D. Ohio, May 8, 1963), affirmed *per curiam*, 375 U.S. 215:

> The movement of iron ore is highly concentrated. Ninety percent of the total traffic moves from seven Lake ports and three north Atlantic ports, and is delivered to the railroads by vessels in quantities averaging over 12,000 gross tons at the Lake ports and 23,000 gross tons at the Atlantic ports. The remainder of the iron ore traffic originates at eight domestic mine origins and moves in quantities amounting either to trainloads or substantial fractions of trainloads. The entire traffic, amounting to over 60 million net tons in 1957, is delivered at approximately 90 destinations where blast furnaces are located. By contrast, scrap iron moves from many points, 501 origins in a typical month. A study made by the Bethlehem Steel Company showed 263 origins, with individual plants receiving scrap from as many as 115 origins. Although the origin and destination points for iron ore are constant from year to year there are frequent changes in the origins from which particular mills obtain their scrap.
>
> The average weight per carload differs widely, iron ore loading in excess of 70 net tons and scrap to 50 net tons. While iron ore moves largely over single-line direct routes, scrap moves over a multiplicity of routes, some of which are extremely circuitous. Because iron ore is frequently delivered to the railroads in quantities in excess of trainloads, it does not require the very expensive terminal services involved in way train and classification-yard services which are characteristic of the movement of any commodity such as scrap, where the typical movement is a single carload. * * *



In these circumstances the Commission concluded that the mere fact that the revenue yield from one carload of scrap may be slightly higher than the revenue yield from one carload of ore does not establish rate discrimination. Moreover, the Commission concluded that comparison only on a per-car basis is misleading because scrap and iron ore are not interchangeable on a one-for-one basis in the steelmaking process. After analyzing the industrial process involved the Commission computed the transportation cost for one ton of scrap and the equivalent amount of

virgin raw materials, with the following results (App. 81):

*Transportation cost*[1] *of scrap*[2] *and comparable raw materials*[3]

| | 1966 | 1969 | Present | With Ex Parte 281 |
|---|---|---|---|---|
| Raw materials: | | | | |
| With coking coal | $5.72 | $6.67 | $8.49 | $8.87 |
| With coke | 5.80 | 7.15 | 8.62 | 9.03 |
| Scrap | 4.12 | 4.50 | 5.58 | 5.83 |
| Difference: | | | | |
| With coking coal | 1.60 | 2.17 | 2.91 | 3.04 |
| With coke | 1.68 | 2.65 | 3.04 | 3.20 |

[1] Average revenue per ton.
[2] One ton of scrap iron or steel.
[3] Raw materials required to produce one ton of pig iron.

In other words, when compared with the virgin raw materials with which it actually competes in the steelmaking process, ferrous scrap already enjoys a rate advantage of more than $3.00 per ton, and that advantage is increased as a result of the Ex Parte 281 general increase.[13]

[13] Moreover, despite recent legislative attempts to tie the rail freight rate structure to costs (see, *e.g.*, S. 2842, 92d Cong., 1st Sess., which would have amended the Interstate Commerce Act to tie railroad rates to variable and fully allocated costs), railroad rates have never been based solely on costs, but rather are set by carrier management on the basis of a variety of factors. As this Court stated in *Northern Pacific Ry.* v. *North Dakota*, 236 U.S. 585, 598-599, a railroad "is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." With respect to ferrous scrap *vis-a-vis* iron ore, other important transportation characteristics include the predictability, regularity and routinization of shipments, and the physical characteristics of handling the commodities.



We submit that, in its extensive consideration of the environmental consequences of the proposed general increase,[14] the Commission has complied with the requirements of NEPA. The agency has taken the requisite "hard look" at environmental factors in reaching its decision, and its conclusion that the proposed general increase will have no significant adverse effect on the environment was well within its discretion.

Moreover, even if it were assumed that the rate increase has environmental effects, there are two sides to the environmental picture—a matter carefully explored by the Commission but wholly ignored by the court below. The importance of additional revenue to the economic well-being of the railroads is evident. In addition, the Commission concluded, increased rail-

[14] In addition to the matters discussed above, the Commission's final impact statement also discussed in detail the remaining four NEPA criteria. It concluded, *inter alia*, that the general increase applicable to recyclables would not cause any unavoidable adverse environmental effect (App. 138–139), that, by guaranteeing the continuation of rail service, it will have a beneficial long-term effect (App. 157), and that it would not result in any irreversible and irretrievable commitments of resources (App. 157–158). The possible alternatives to the increase were considered in some detail, including the possibility of a holddown of rates on recyclables until the completion of Ex Parte 270 (App. 145–146), the use of selective increases on a commodity-by-commodity basis in lieu of general increases (App. 146–150), the imposition of a requirement that railroads reduce their costs (App. 150–151), the possibility of federal or state subsidies to railroads (App. 151) or "deregulation" of recyclables (App. 154–155), and expansion of government purchases of recyclables (App. 155–156), but concluded that there was "no warrant for deferring our actions in favor of any of them" (App. 157).

road revenues will produce collateral environmental benefits. For example, the railroads now face significant direct environmental costs which can be met only by sufficient revenue. The railroads spent $10 million per year in 1969 and 1970 on pollution control and devoted $55 million to capital improvements for environmental purposes between 1968 and 1970 (App. 58). Such expenditures can be made only if the railroads have sufficient revenues to meet the costs. Similarly, the threat of traffic diversion to trucks, or of non-movement of scrap, is in large part a factor of the railroads' inability to provide adequate service—a direct result of their inability to pay for capital improvements in roadbed, equipment, and the like. The history of this problem considerably antedates NEPA, and has been noted in a number of prior Commission decisions (see App. 58–65). To a large extent, it is a problem of adequate supply and utilization of freight cars (see *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742; *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224), and it is the constant subject of legislative attempts to provide assistance to the railroads.[15] And, as Mr. Justice White graphically noted in concurring in a portion of this Court's prior opinion in this case (412 U.S. at 724), "failure to maintain this country's railroads even in their present anemic condition will guarantee that re-

[15] A recent example is S. 1149, 93d Cong., 1st Sess., a bill to provide government loan guarantees for the railroads' purchases of new freight cars, which was reported out of the Senate Committee on Commerce (S. Rep. No. 93–303, 93d Cong., 1st Sess.) and passed by the Senate.



cyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all."

Against this background the district court's criticisms do not show noncompliance with NEPA. There was no need for the Commission to "offer any rigorous price sensitivity studies of its own" (J.S. App. A, p. 31a) when the data it introduced indicated that the scrap market was not sensitive to rail rate increases of the magnitude involved here; there is no need for the Commission to duplicate the work of others, nor is it necessary to conduct additional studies merely because preliminary studies show no environmental effect. NEPA does not require the maximum possible effort to ferret out possible effects; it requires only a reasonable effort.

Nor is the statement defective because the district court found "defensive and advocatory language" (J.S. App. A, p. 29a). The "defensive" language to which the court objected was part of the Commission's response to comments that had criticized its analysis. This process of comment and response is integral to a demonstration that environmental effects were considered in the decision; surely, if it believes one of the protestants is wrong, the Commission is entitled to say so, and to say why.[16]

[16] Although the district court complained about the "attacks" in the impact statement on the views of those opposing the increase (J.S. App. A, p. 29a), it also complained that the Commission's final opinion does not "confront or even acknowledge the critical comments of other concerned agencies and environmental groups appended to the statement" (*id.* at 23a–24a). But see J.S. App. A, p. 31a. ("The Commission appended these comments to the back of its final statement and in some

### 3. *The District Court May Not Reject an Impact Statement Merely Because It Disagrees With the Statement's Conclusions*

Although the district court eschewed any "substantive" review of the Commission's conclusions (J.S. App. A, p. 22a), many of its criticisms of the impact statement are, at bottom, substantive. For example, the Court complained of the Commission's failure "to alter its draft impact statement in response to three of the critical comments * * *" (J.S. App. A, p. 31a). But the Commission would be required to "alter" its impact statement to meet criticism only if the critics were right and the Commission wrong. And the Commission would be required to conduct additional "price sensitivity studies of its own" (*ibid.*) only if it were wrong in concluding that the data before it indicates that the effect of rail prices is minimal. Indeed, the language of the impact statement may be viewed as "defensive" only if the court agrees with the critics rather than with the Commission's response that certain critics are "one-dimensional" or "naive" (App. 16).

In these respects, therefore, the district court's approach was basically substantive rather than procedural. And it is difficult to believe that the court would have ordered the Commission to reconsider if the Commission had concluded, on the basis of the same

instances made arguments against the criticisms within the body of this final statement.") There is, we submit, no legal basis for requiring the Commission's answers to environmental criticisms to be omitted from its impact statement and, instead, to be separately stated in an opinion.



impact statement, that environmental considerations required the rate increases on scrap to be disapproved, and the railroads had sought review. Indeed, the court suggested (J.S. App. A, pp. 37a–38a), presumably on the basis of the same statement and record on which the Commission here acted, that the Commission should have prohibited the scrap rate increases altogether until it completed its investigation (now proceeding in Ex Parte 270) of the entire railroad rate structure. But under Section 15(7) the Commission could not order such a moratorium unless it were convinced that the proposed rates were *not* just and reasonable. It is therefore apparent that the district court, rather than finding a lack of evidence to support the Commission's position, has weighed the evidence *de novo* and concluded that environmental factors justified indefinite postponement of the rate increases.

This scope of substantive review is improper under the decisions of this Court. The Commission's evaluation of the evidence, and its choice of methodology for gathering sufficient evidence, should not be set aside where, as here, it is "rationally supported." *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 749. NEPA does not create a different scope of judicial review of Commission determinations; NEPA merely requires the Commission to make additional determinations which are subject to review under the ordinary standards. A thoughtful analysis of the relation of NEPA to the scope of review of Commission decisions was penned by Judge Friendly for the court in *City*

*of New York* v. *United States, supra,* 344 F. Supp. at 939–940:

> Normally, of course, judicial review of the merits of an ICC abandonment order is governed by the standards expressed in § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 [citations omitted], and thus is generally limited to determining, in essence, whether the Commission's findings and conclusions are supported by substantial evidence and are not an abuse of discretion. We seriously doubt, however, that the merits of the Commission's determinations under NEPA are subject to even that degree of review. NEPA itself contains no requirement that an agency hold hearings to investigate the environmental consequences of the proposed action, and does not specify that findings are necessarily to be made. Moreover, NEPA is often applicable to agency decision making where adjudicatory proceedings are not required. [Citations omitted.] No formal record is contemplated in such situations and the function of the courts is thus necessarily limited. [Citation omitted.] To ensure implementation of the national environmental policy, see NEPA § 101, 42 U.S.C. § 4331, procedures were prescribed in § 102(2) to compel administrative exploration and consideration of environmental consequences. *Once it is determined in any particular instance that there has been good faith compliance with those procedures, we seriously question whether much remains for a reviewing court.* In this vein, it has been suggested that "reviewing courts probably cannot reverse a substantive decision on its merits, under [NEPA], unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental factors." *Calvert Cliffs', supra,* 449 F. 2d 1115 [footnotes omitted; emphasis added].



We submit that this is the correct approach, and that the district court here has exceeded the scope of review open to it.[17] See, *e.g., Louisiana* v. *Federal Power Commission, supra; Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275 (C.A. 9); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F.2d 783 (C.A.D.C.); *Upper Pecos Association* v. *Stans, supra.*

## II. THE DISTRICT COURT IMPROPERLY INTERFERED WITH THE COMMISSION'S DISCRETION TO DETERMINE THE APPROPRIATE PROCEEDING IN WHICH TO CONSIDER THE BASIC RATE STRUCTURE

In addition to the district court's criticisms of the impact statement discussed *supra,* the court also leveled two procedural criticisms. The court held, first, that the Commission was required, in a general revenue proceeding, to analyze the environmental effects of the entire railroad rate structure, and, second, that the Commission was required to recommence the entire review procedure after drafting an impact statement adequate in the eyes of the court. We address

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[17] Indeed, some courts have confined review of impact statements to whether the agency made "an objective good faith effort to comply with the statutory procedural requirements." *National Helium Corp.* v. *Morton,* 486 F.2d 995, 1001 (C.A. 10), certiorari denied, 416 U.S. 993. See also, *Hiram Clarke Civic Club, Inc.* v. *Lynn,* 476 F.2d 421, 425 (C.A. 5).

the first of these holdings here and the second in point III, *infra.*

A. NEPA DOES NOT TAKE AWAY THE COMMISSION'S DISCRETION TO DETERMINE THE APPROPRIATE PROCEEDINGS IN WHICH TO CONSIDER PARTICULAR ISSUES

The Commission's final impact statement showed that the Commission here "made an examination of the presently effective railroad rate structure" (App. 26) and determined that "[t]he present rate structure * * * does not, in our opinion, unduly hamper the free flow of [recyclable] materials * * * " (App. 152). In support of this conclusion the Commission examined waybill samples, costs and technologies in the scrap and competing virgin-source industries, manufacturing techniques, pricing factors, volume of movements, transportation costs and characteristics, carrier revenue needs, and alternatives to the increases (App. 44–46, 53–55, 70–82, 91, 94, 104, 106, 113–116, 150–157, 190–191). We submit that this inquiry into the effect of the underlying rate structure was entirely sufficient for purposes of the peculiarly limited issues to be decided by the Commission in a general revenue proceeding. See pp. 18–35, *supra,* and pp. 43–46, *infra.*

The district court, however, held that the impact statement's "most fundamental and important deficiency" (J.S. App. A, p. 34a) was "the limitation of its analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (*ibid.*). Thus, by effectively prohibiting the Commission from approving a general rate increase



until it has conducted a complete analysis of the underlying rate structure, the district court's holding would force the Commission either to abandon general revenue proceedings altogether (notwithstanding the statutory authorization of such proceedings in Section 15(7)) or to consider in them matters more appropriately at issue in proceedings such as Ex Parte 270, the Commission's current investigation of the entire rate structure. In so holding, the district court, in our view, acted contrary to this Court's previous admonition in this case that "NEPA was not intended to repeal by implication any other statute" (412 U.S. at 694).

The decision to approve a general rate increase before definitively resolving all questions relating to a possible need for restructuring the rail freight rate system was, we submit, plainly within the Commission's discretion. As this Court definitively held in *American Lines* v. *Louisville & Nashville R. Co.,* 392 U.S. 571, 592, the Commission must be left with reasonable latitude to decide in what kinds of proceedings it will address complex rate questions:

> Given the fact that * * * the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide

where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.,* at 776. That principle is equally applicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency.

See, also, *Wichita Board of Trade, supra,* 412 U.S. at 819–821.

Nothing in the language, legislative history, or purpose of NEPA removes from the Commission this "reasonable latitude to decide where it will resolve * * * complex issues, in addition to how it will resolve them." Indeed, the courts have generally recognized that NEPA does not take away the discretion



of an agency to determine in what proceeding it should address a particular question. For example, in *Sierra Club* v. *Callaway* (*Trinity River*), 499 F. 2d 982, the Fifth Circuit held that it was improper for the district court to compel an agency to analyze a series of construction projects in a single impact statement, rather than one project per statement. The Second Circuit, in *Ecology Action* v. *Atomic Energy Commission,* 492 F. 2d 998, 1002, held that the Atomic Energy Commission was entitled to develop definitive reactor safety criteria in a consolidated proceeding while continuing to license particular reactors. Accord, *Union of Concerned Scientists* v. *Atomic Energy Commission,* 499 F. 2d 1069, 1082–1085 (C.A.D.C.). And in *Jicarilla Apache Tribe of Indians, supra,* the Ninth Circuit allowed the Department of the Interior to proceed with consideration of particular dam projects prior to the completion of the long-range Southwest Energy Study, pointing out that if the courts were "to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated" (471 F. 2d at 1280). See also *Life of the Land* v. *Brinegar, supra; Environmental Defense Fund, Inc.* v. *Armstrong,* 356 F. Supp. 131, 139 (N.D. Cal.).

B. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN DECIDING TO CONSIDER THE OVERALL EFFECTS OF THE RATE STRUCTURE IN EX PARTE 270 RATHER THAN IN EX PARTE 281

The principal reason given by the district court for requiring the Commission to undertake a full survey of the rate structure was that an across-the-board

increase will "presumptively aggravate" environmental problems if the underlying rate structure "contributes to the degradation of our environment" (J.S. App. A, pp. 34a–35a). This, however, begs the important question whether the underlying rate structure does so discriminate.[18] The Commission examined the evidence on a preliminary basis and concluded that it does not (see pp. 32, 40, *supra*). It was improper for the district court, on the basis of an unsupported suspicion that more evidence might prove the Commission wrong, to order the Commission to create that additional evidence and to postpone the rate increases until it had done so. The Commission's decision to allocate to Ex Parte 270 the gathering of that additional evidence should be sustained unless arbitrary or capricious—and the Commission's preliminary determination that the basic rate structure was not seriously defective was sufficient under that standard.

As explained *supra,* pp. 21–22, in general revenue proceedings the Commission determines whether the carriers' collective revenue needs require a rate increase in order to provide them with adequate rates of return and to provide the Nation with adequate transportation. If the carriers demonstrate that such relief is consistent with the public interest the Commission will permit them to file tariffs to generate the needed

[18] In any event, an across-the-board percentage increase in freight rates which does not exceed the percentage increase in other costs caused by inflation would not "aggravate" any existing disparity. And here the Commission's decision to limit price increases on nonferrous scrap to three percent tended to improve its position vis-a-vis virgin materials.



revenue. But in this sort of proceeding the Commission does not determine the reasonableness of any particular rate, nor does it consider the rate relationships of one commodity class to another—or even the revenue needs of a particular railroad (J.S. App. D, pp. 16d–17d). The procedure is expeditious and effective to ameliorate a revenue deficit precisely because it does *not* involve consideration of all possible variables. If the Commission were compelled to increase the number of different disputes that must be resolved in every general revenue proceeding, it would be unable to complete its work in the seven months allowed by Section 15(7). The Commission's current study of the entire rate structure, Ex Parte 270, *Investigation of Railroad Freight Rate Structure,* was commenced in 1970 and is still some years from completion. It has only recently produced an environmental impact statement, served August 2, 1974, in Sub-Nos. 5 and 6, concerning iron ores and scrap iron and steel. This impact statement alone consumes 313 pages and was produced only with the help of a special appropriation from Congress, a "special counsel" and staff devoted to this single task, and, for only the second time in the Commission's history, the appointment of a Commissioner as "Coordinator" in charge of the proceeding. Additional impact statements are forthcoming.

It was thus entirely appropriate for the Commission to conclude, in Ex Parte 281, that it would confine most of its attention to the marginal effects of the rate increases, while leaving to Ex Parte 270 the full

study that is required from time to time. It would be impractical for the Commission to attempt to duplicate, in every general revenue proceeding, the effort expended in Ex Parte 270;[19] nor would it be proper for the Commission to impose on the financially hard-pressed railroads a "moratorium" on rate increases until Ex Parte 270 is completed. The requirement of such a moratorium here not only would be inconsistent with the Commission's discretion to determine the appropriate proceeding in which to consider a particular issue, but it would be contrary to Section 15(7), which provides that rate increases become effective unless the Commission affirmatively declares them unlawful. Cf. *American Telephone and Telegraph Co.* v. *Federal Communications Commission*, 487 F. 2d 865 (C.A. 2).

In sum, there was no warrant for the district court's order to the Commission to reexamine the railroad rate structure in Ex Parte 281. It interfered with discretion reserved to the Commission and, if required, would virtually nullify the Commission's authority to entertain general revenue proceedings.

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[19] Nor would it necessarily be desirable for the Commission thoroughly to reexamine the rate structure on every available occasion. Most governmental decisions are made at the margin, partly for the very practical reason that governments do not operate on the maximum conceivable information, but on an amount that usefully can be generated and used in the time available and at reasonable cost. See generally Lindblom, *The Science of "Muddling Through,"* 19 Pub. Admin. Rev. 79 (1959).



### III. THE COMMISSION WAS NOT REQUIRED TO CONDUCT ORAL HEARINGS AFTER PUBLICATION OF THE IMPACT STATEMENT

The district court held that, because Section 102(2)(C) of NEPA provides that the environmental impact statement "shall accompany the proposal through the existing agency review processes," there is a "strong presumption" that the Commission was required, before reaching a decision, to conduct additional oral hearings after it had issued a draft impact statement, received comments, and settled on a final impact statement. See J.S. App. A, pp. 42a–43a.

#### A. GENERAL REVENUE PROCEEDINGS ARE RULEMAKING PROCEEDINGS AND REQUIRE NO ORAL HEARINGS

The requirement in Section 102(2)(C) that the impact statement "accompany" the agency's "proposal" through the "existing" agency stages of "review" does not support the district court's conclusion here. Because of the nature of the Commission's general revenue proceedings, the agency itself makes no "proposal" for action, and it conducts no intra-agency "review" of an initial decision. This provision of NEPA has obvious application to situations where an agency publishes a proposal for federal action and then holds public hearings on the proposal it has published. And the requirement that the impact statement "accompany" the "proposal" through existing review procedures can also reasonably be applied to situations where an agency has two tiers of review, with a hearing examiner making an initial decision,

and the agency hearing appeals. It is from the latter paradigm that the district court drew its analogies. In *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F. 2d 1109 (C.A.D.C.); *Greene County Planning Board* v. *Federal Power Commission,* 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849; and *Harlem Valley Transportation Association* v. *Stafford,* 500 F. 2d 328 (C.A. 2), courts have required agencies that employ administrative law judges to make an initial decision in an adjudicative proceeding to prepare an environmental impact statement before the first hearings are held, so that the impact statement can "accompany" other papers through the existing "review" process.

However suitable this procedure may be in such two-stage administrative proceedings, it has no proper application to the Commission's general revenue proceedings. These proceedings do not involve intra-agency review within the scope of Section 102(2)(C). In a Section 15(7) general revenue proceeding the initial and only agency decision is made by the Commission itself. There are no intermediate agency decision makers, nor are there any agency "review" procedures. In the absence of such procedures, we submit, there was no violation of NEPA, which expressly refers to "existing" review procedures and does not compel the Commission to create new levels or stages of intra-agency review.

This conclusion follows from the fact that general revenue proceedings under Section 15(7) are rulemaking, conducted pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. 553. Such proceedings do not require oral hearings or intermediate stages of agency review. *United States* v. *Florida East Coast Ry. Co., supra,* 410 U.S. at 236–238; *United States* v. *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 756–758. Cf. Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking,* 87 Harv. L. Rev. 782, 790–796 (1974).



Nor is there any independent requirement in NEPA that an agency hold hearings on environmental issues. It need do so only if such hearings are part of the "existing" process of "review." See *City of New York* v. *United States, supra,* 344 F. Supp. at 939–940. As the Ninth Circuit has explained:

> To hold in the abstract that meaningful public participation in the NEPA process cannot exist unless public hearings are held subsequent to the issuance of a draft environmental impact statement and prior to the preparation of the final document would be to substitute our judgment for that of Congress. It is true that the legislative history of NEPA indicates that the desire for a greater degree of responsiveness by administrative decision makers was one factor in the passage of NEPA. Despite this concern, however, there is no express provision in NEPA requiring administrative hearings as a procedural step in the preparation of § 102(2)(C) environmental impact statements. [*Jicarilla Apache Tribe of Indians, supra,* 471 F. 2d at 1286; footnote omitted.]

The district court's suggestion (J.S. App. A, p. 42a) that oral hearings are *de facto* part of the Commis-

sion's "existing" review procedure in general revenue proceedings is incorrect. Oral hearings—which are most useful for cross-examination or the development of facts or issues that cannot be exposed adequately in writing—often are useful for some issues in a particular case but not for other issues. The Commission frequently limits oral hearings in a particular case to specific issues, and, indeed, a majority of all Section 15(7) proceedings involving rate proposals are handled with no oral hearings at all.[20] There is nothing peculiar to environmental issues that makes them unsuitable for written presentation. The most persuasive environmental arguments tend to be in the form of complicated data that is quite unsuitable for oral presentation. Accordingly, even though an oral hearing was held at an earlier stage of this case, there is no basis for requiring the Commission to hold additional oral hearings concerning the environmental impact statement on the ground that such hearings are a regular part of the Commission's "existing" process of "review" in such cases.[21]

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[20] Of all Commission proceedings under Section 15(7) during calendar 1973, there were oral hearings in 55 and no hearings in 123 cases. Of more recent general revenue proceedings oral hearings have been allowed as follows: Ex Parte 295—limited hearings for cross-examination; Ex Parte 299—unlimited oral hearings; Ex Parte 303—no hearings; Ex Parte 305—no hearings.

[21] Moreover, all interested persons and protestants had an opportunity at the hearings held on June 15 and 16, 1972, to make oral presentations concerning potential environmental effects.



B. THE COMMISSION MAY CONSIDER ENVIRONMENTAL EFFECTS WITHOUT "STARTING AGAIN"

Once it is concluded that the Commission is not required to hold oral hearings on an impact statement, the foundation for the district court's directive (J.S. App. A, pp. 24a–25a) to the Commission to start its proceedings from the beginning vanishes. Because general revenue proceedings are rulemaking, the only apparent "beginning" to which the Commission could return here would be an oral hearing.

Even if there was another relevant "starting point" to which the Commission could return, it was unnecessary for it to do so. The Commission's impact statement, which we have demonstrated *supra* was adequate, concluded that there were no significant environmental consequences of the across-the-board increase. It would be extravagantly wasteful, and unfair to the parties, for the Commission to begin its proceedings over again in light of its discovery that there were no serious environmental effects.

A requirement to begin "over again" can be meaningful only if it would inject into the "early" stages of the Commission's consideration factors that previously were missing and might affect the outcome. The record here discloses that environmental possibilities were in fact considered at the earliest possible stages, from the time the Commission required the railroads to submit their own impact statement, through the Commission's first impact statement, through extensive consideration in the Commission's

decision of October 4, 1972. And because the Commission ultimately concluded that environmental effects were minimal, their more extensive consideration at an earlier stage could not have affected the outcome.

Finally, we submit that, even if there are technical defects in the Commission's compliance with NEPA, the extensive environmental inquiry conducted by the Commission constituted a good faith, integrated consideration of environmental effects along with the other pertinent considerations. In these circumstances technical defects in the impact statement itself do not disable the agency from rendering a valid final decision. See, *e.g., Life of the Land* v. *Brinegar,* 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961 (impact statement circulated after hearing, but extensive environmental inquiry before hearing); *Jicarilla Apache Tribe of Indians, supra; City of New York, supra; Hanly* v. *Kleindienst,* 471 F. 2d 823, 836 (C.A. 2), certiorari denied, 412 U.S. 908 (public participation in agency's environmental considerations).

In sum the Commission in this case, after taking an extended hard look at the pertinent environmental possibilities, and after issuing two impact statements, concluded that it had no cause to prohibit the railroads from increasing the transportation cost of scrap as well as the cost of virgin materials. The Commission's consideration of environmental effects, while undoubtedly not perfect, was, we submit, completely adequate to meet the requirements of NEPA.



## CONCLUSION

For the foregoing reasons the district court's judgment should be reversed and the case remanded with directions to dismiss the complaint.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*
WALLACE H. JOHNSON,
*Assistant Attorney General.*
FRANK H. EASTERBROOK,
*Assistant to the Solicitor General.*
FRITZ R. KAHN,
*General Counsel,*
BETTY JO CHRISTIAN,
*Associate General Counsel,*
CHARLES H. WHITE, JR.,
*Attorney,*
*Interstate Commerce Commission.*

DECEMBER 1974.

## APPENDIX

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after

it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accuate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332 provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—



> (A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact

involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * * * *

COMMISSION'S SPECIAL ENVIRONMENTAL RULES, 49 C.F.R. 1100.250, 340 I.C.C. 431, PROMULGATED PURSUANT TO 42 U.S.C. 4332(2)(B), PROVIDE:

SPECIAL RULES PERTAINING TO ALL PROCEEDINGS BEFORE THE COMMISSION TO INSURE THAT ENVIRONMENTAL AMENITIES AND VALUES ARE GIVEN APPROPRIATE CONSIDERATION

(a) *Scope of special rules.* These special rules are applicable to all proceedings before the Commission. They are intended to assist the Commission in discharging its duties under the National Environmental Policy Act of 1969 (Public Law 91–190, 83 Stat. 852) which authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies for the protection of the environment declared in that act.

(b) *Detailed environmental statement.* (1) It shall be the general policy of the Interstate Commerce Commission to adopt and adhere to the objectives and



aims of the National Environmental Policy Act in performing its regulatory duties and powers under the Interstate Commerce Act and related statutes. Among other things, the National Environmental Policy Act requires, to the fullest extent possible, a detailed environmental statement in all reports and recommendations on legislative proposals and other major Federal actions which will significantly affect the quality of the human environment.

(2) In compliance with this requirement, a detailed environment statement will be made when the regulatory action taken by the Commission under the applicable statutes will have such a significant environmental impact. The detailed statement, which statement shall be made as part of the initial decision in the proceeding and shall become final (with or without modification) when a final decision or order is entered by the Commission, shall fully develop the five factors listed below, among other relevant factors including the justification of a proposed action as compared to its alternatives. The following factors are listed merely to illustrate the kinds of values that *must* be considered in the statement, and in no respect is this listing to be construed as covering all factors relevant to the disposition of any particular proceeding:

(i) The environmental impact of the requested action;

(ii) Any adverse environmental effects which cannot be avoided should the requested action be granted;

(iii) Alternatives to the requested action;

(iv) The relationship, if any, between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the requested action should it be granted.

The procedures set forth in this rule are intended to encourage, to the fullest extent possible, public and governmental participation in those formal proceedings which might significantly affect the quality of the human environment, and to the end of insuring that a complete record is developed which will enable the Commission to consider fully the environmental impact of a contemplated action.

(c) *Applicable general and special rules not affected.* The Commission's general and/or special rules heretofore applicable to a proceeding shall remain in effect and govern the procedure therein. These special rules shall supplement the applicable existing rules.

(d) *Papers to show effect of subject matter of proceeding on the quality of human environment.* (1) In all initial papers filed with this Commission by a party, there shall be filed a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in paragraph (b)(2)(i)–(v) of this section.

(2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in paragraph (b)(2)(i)–(v) of this section.

(e) *Notice to appropriate governmental agencies.* (1) All papers submitted in compliance with these rules, and affirmatively alleging a substantial environmental impact, beneficial or adverse, shall be served by the person or persons submitting it on those governmental bodies given notice pursuant to subparagraph (1) of this paragraph. The person or persons submitting the statement also shall supply 10 copies of



the statement to the Council on Environmental Quality.

(2) A notice of all proceedings determined to have a significant effect on the quality of the human environment will be transmitted by the Commission as promptly as possible to the Council on Environmental Quality and to appropriate governmental bodies—Federal, regional, State, and local—(as identified in the guidelines promulgated by the Council on Environmental Quality) with a request for public comments on the environmental considerations listed in paragraph (b)(2)(i)–(v) of this section.

(3) All interveners, including other Government agencies, taking a position on environmental matters shall file with the Commission an explanation of their environmental position, specifying any differences with the original party's detailed statement upon whichintervener wishes to make its views known, and including therein a discussion of that position in the context of the factors enumerated in paragraph (b) of this section. All interveners shall be responsible for filing 10 copies of their submission with the Council on Environmental Quality at the time they file with the Commission and shall also supply a copy of such submission to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The Commission will consider all representations submitted prior to the final disposition of the proceeding.

(4) The views of the Council on Environmental Quality, if any, should be made in a written statement served upon the Secretary of the Commission and all parties of record.

(f) *Official notice.* The Commission may take official notice of any facts relating to the environmental situations before it. This shall include, but not be limited

to, scientific studies, governmental reports, and maps which have not been presented in evidence by any of the parties of record.

(g) *Determinations.* The determinations in all proceedings which investigate environmental issues should include an evaluation of the environmental factors enumerated in paragraph (b)(2)(i)–(v) of this section, and the views expressed in conjunction therewith by all persons making formal comment pursuant to the provisions of this section. Specific findings should be made in each such proceeding as to whether the relief sought is or is not environmentally advantageous.

(h) *Review of initial decision on environmental impact.* Any decision with respect to the environmental issue will be subject to Commission review in the same manner as other issues in the proceeding.

(i) *Proceedings in progress.* With respect to those proceedings already in progress, the Commission recognizes that it may not be possible to comply fully with the procedures outlined herein and, in particular, that it may not be possible in every instance to include within the record all of the material relating to the environmental impact of the contemplated action which might otherwise be developed. Nonetheless, it is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings already in progress.

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